RECEIVED
SEP 18 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5414

ILYA WOLSTON,

Petitioner,

v.

THE READER'S DIGEST ASSOCIATION, INC., d/b/a READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC.; MACMILLAN BOOK CLUBS, INC.; JOHN BARRON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIDNEY DICKSTEIN
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

Of Counsel:

DICKSTEIN, SHAPIRO & MORIN

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	
1. Nature of the Case and Proceedings Below	2
2. The Plaintiff's Background and Activities	3
3. The Research and Writing of KGB: The Secret Work of Soviet Agents	7
REASONS FOR GRANTING THE WRIT	
I. A. The Determination of the Courts Below That Petitioner is a Public Figure is Contrary to the Decisions of This Court	10
B. Alternatively, if Firestone Does Not Clearly Stand for the Proposition That Persons Like Wolston Are Not Public Figures, There is a Question of Substantial Importance Which the Court Has Not, But Should Decide	12
II. The Grant of Summary Judgment on the Malice Issue is in Conflict With the Decisions of This Court and of Another Court of Appeals	14
CONCLUSION	19
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases	Page
Adickes v. Kress & Co., 398 U.S. 144 (1970)	16
Agosto v. Immigration & Naturalization Service, 98 S.Ct. 2081 (1978)	15
Anderson v. Stanco Sports Library, 542 F.2d 638 (4 Cir. 1976)	12, 13
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	13
Gertz v. Robert Welch, Inc., 418 U.S. 323, (1974)	10, 11
Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F.2d 438 (9 Cir.), cert. denied, 419 U.S. 872 (1974)	17
Herbert v. Lando, No. 77-1105, cert. granted, 98 S.Ct. 1483 (1978)	19
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	2, 14, 15, 16, 18, 19
Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969)	19
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962)	15, 16
Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)	10
St. Amant v. Thompson, 390 U.S. 727 (1968)	14, 16
Time, Inc. v. Firestone, 424 U.S. 448 (1976)	10, 11, 12, 13
United States v. Diebold, Inc., 369 U.S. 654 (1962)	16
Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967)	17
Wasserman v. Time, Inc., 424 F.2d 920 (1970), cert. denied, 398 U.S. 940 (1970)	17

Miscellaneous

Page

1 A.B. Hanson, Libel and Related Torts, ¶ 141 (Supp. 1976) 12

Case Note, Constitutional Law - Defamation - the New York Times Standard and Reports of Judicial Proceedings: Time, Inc. v. Firestone, 424 U.S. 448 (1976), 37 Ohio S.L.J. 881, 890 (1976) 12

Comment, Defamation Law After Time, Inc. v. Firestone, 13 Idaho L. Rev. 53 (1976) 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

ILYA WOLSTON,

Petitioner,

v.

THE READER'S DIGEST ASSOCIATION, INC., d/b/a READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC.; MACMILLAN BOOK CLUBS, INC.; JOHN BARRON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 578 F.2d 427 and is reproduced in the Appendix to this petition at pp. A-1, et seq.[1/] The opinion and order of the District Court

---

1/ This Appendix will be hereinafter cited as "App.". References to the Appendix in the court below will be cited as "CA App.".

granting defendants' motion for summary judgment is reported at 429 F. Supp. 167 and is reproduced at App. A-17, et seq.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). An Order extending time to file the petition for writ of certiorari until September 21, 1978 was entered on August 7, 1978.

QUESTIONS PRESENTED

I. Is a libel plaintiff necessarily a public figure subject to the rule of New York Times Co. v. Sullivan, 376 U.S. 254, because he had engaged in conduct which resulted in his becoming a defendant in a criminal proceeding?

II. In an action governed by New York Times Co. v. Sullivan, 376 U.S. 254, may a court grant summary judgment to the defendants by accepting the testimony of the author whose state of mind is at issue, and itself choosing among the conflicting inferences which can be drawn from that testimony and other evidence?

STATEMENT OF THE CASE

1. Nature of the Case and Proceedings Below

This matter comes to the Court from affirmance by the Court of Appeals for the District of Columbia of a final order of the District Court granting the defendants' motion for summary judgment in a libel action brought against the author and

the initial and subsequent publishers of the book KGB: The Secret Work of Soviet Agents ("KGB"). The book falsely describes petitioner Wolston as a Soviet agent and falsely suggests that he had been indicted or convicted of espionage or perjury in connection with espionage investigations. The basis for granting summary judgment, insofar as it was affirmed by the Court of Appeals, was that Wolston was a public figure, required as a matter of law to establish "actual malice" by the defendants, and that the facts, including the testimony of the book's author with respect to his state of mind when he wrote the passages pertaining to Wolston, demonstrated that Wolston "could [not] show enough to go to a jury on the issue of actual malice." (App. A-9).

2. The Plaintiff's Background and Activities

Wolston was born in Russia in 1918, moved to Lithuania as an infant, and thereafter lived in Germany, France and England before coming to the United States in 1939 (CA App. 157-159). He was drafted into the army in 1942 (CA App. 167), was trained as a Russian interpreter, and served as such in liaison work with Soviet military personnel, primarily in Alaska (CA App. 169). During the 1945 San Francisco conferences establishing the United Nations, Wolston was assigned as an interpreter to the Russian delegation's flight crew (CA App. 171). He was honorably discharged in 1946 (CA App. 173).

Following his discharge Wolston went to Europe where he obtained a job as a civilian interpreter with the United States Military Government in Berlin, remaining in this position

when the State Department assumed military government functions. His employment with the State Department ended in 1951 due to a reduction in force (CA App. 181).

Wolston thereupon returned to New York where he enrolled in college and worked part time as the supervisor of a project involving the translation of place names on captured Russian maps (CA App. 189-190). In 1955 he received a full-time job offer from the Army Map Service, and moved to the Washington area (CA App. 192-193). Shortly thereafter, his first child contracted pneumonia and died, followed hard upon by his mother's death (CA App. 193). Wolston went into a state of extreme depression, resigned his position with the Army Map Service, and was treated for his mental condition, treatment which included frequent administration of electric shock therapy (CA App. 194-195).

In January, 1957, the FBI arrested Jack Soble and his wife, Wolston's uncle and aunt, on espionage charges. On the day of the Sobles' arrest, Wolston and his wife were "invited" to FBI headquarters and interrogated for several days. Thereafter Wolston was subjected to successive interrogations in New York and Washington, his appearances in New York being compelled by grand jury subpoenas (CA App. 354).

Meanwhile his treatment for mental disorder continued, including some 13 shock treatments in 1957. Explanations of Wolston's condition were made to the Office of the United States Attorney for the Southern District of New York, and medical certificates were submitted in an unsuccessful effort

to persuade the FBI and the Assistant United States Attorney who was conducting the investigation not to require Wolston to continue to travel to New York for lengthy interrogations (CA App. 354). However, Wolston was served with still another grand jury subpoena, this one returnable on May 27, 1958. He came to New York with his wife to be told that the Grand Jury would not be sitting that day. Instead he was ushered into an interrogation room and subjected to further intense questioning (CA App. 355).

On Saturday, June 28, 1958, petitioner was served with yet another grand jury subpoena which required his attendance in New York on July 1st. He did not appear. An order to show cause why he should not be held in contempt was issued returnable on July 28th. Wolston appeared in court that day and indicated his willingness to testify. His offer to testify before the grand jury was rejected by the Assistant United States Attorney, who first asserted that the grand jury's term had expired the day before, a Sunday, and then stated that in any event he was not prepared to conduct the examination. The grand jury was discharged, and a criminal contempt hearing was commenced. The plaintiff's wife, who was then pregnant with their second child, was called to testify as to Wolston's mental condition on the return date of the subpoena, but she broke down hysterically during the course of her testimony. Rather than subject her and himself to the continued trauma of the trial, and upon assurance that no jail term would be imposed, Wolston pleaded guilty to contempt. A one year sentence was suspended conditioned on subsequent cooperation with federal

authorities,' and Wolston was placed on three years probation (CA App. 355). A brief flurry of newspaper publicity attended the issuance of the order to show cause and the contempt proceedings (CA App. 215-226).

One year later, Boris Morros, a Jack Soble confederate who had been a double agent for the FBI, published a book entitled My Ten Years As A Counterspy. In the book he stated that Soble had told him of a certain "Slava," who had allegedly supplied Soble with information. He also stated that Soble had eventually identified Slava as his nephew, Ilya Wolston. However, Morros made the point that the only information he had pertaining to Wolston had come from Soble whom he knew to be "a confirmed liar" (CA App. 139).

In May 1960, the Federal Bureau of Investigation prepared a report entitled "Expose of Soviet Espionage" for transmittal to and publication by the Internal Security Subcommittee of the Senate Judiciary Committee. The report refers to "Slava", who is described as a "U.S. Army Colonel in Germany", states that Soble identified his nephew Wolston as Slava in 1955 and that following his guilty plea in April 1957, Soble "furnished information identifying Wolston as a Soviet Agent." The report also claimed that Wolston had been "dismissed" from his State Department employment in Berlin in 1951, based upon his "probable identification" as "a Soviet agent" and data concerning "his black market activities" (CA App. 325-326).

These statements were not only incorrect, they were manifestly inconsistent with Wolston's subsequent employment

by the Army Map Service and the fact that Wolston was never indicted for espionage or perjury.

3. The Research and Writing of KGB: The Secret Work of Soviet Agents

In the late 1960's, defendant Barron, then an associate editor of Reader's Digest, engaged in a prolonged feasibility study of work on Soviet espionage. During the course of that study, Barron and other employees of Reader's Digest approached various foreign and domestic security and intelligence agencies to ask for their assistance if the project were to go forward (CA App. 41). The United States agencies contacted included the FBI, CIA, DIA and the State Department (CA App. 42-43, 48). These agencies all indicated that they would cooperate with the author in his project (CA App. 47-52).

In January of 1971 Barron received authorization from Reader's Digest to proceed with the book. He was given permission to travel extensively, to invest as much time and research as was necessary and to take maximum advantage of the worldwide research capacities of the Reader's Digest organization, which included what Barron described as "magnificent" facilities in New York and Paris and staff offices in many foreign countries, including Germany (CA App. 56, 57, 59, 61). A professional researcher was assigned on a full-time basis to assist Barron and did so for over four years (CA App. 87). These aids to accuracy and depth of research were trumpeted in the preface to the book (KGB preface pp. xi, xii).

All editions of KGB published by Reader's Digest and the reprint publishers contained the following defamatory

statements relating to the plaintiff:

> "Among Soviet agents identified in the United States were Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Pearl, Alfred Dean Slack, Jack Soble, Ilya Wolston, Alfred and Martha Stern."*

---

* "No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt following espionage indictments or who fled to the Soviet bloc to avoid prosecution * * *." (emphasis supplied)(CA App. 119).

In addition, the index to KGB contains the reference: "Wolston, Ilya, Soviet agent in U.S." (CA App. 121).

These statements falsely identify the petitioner as a Soviet agent, join his name with those of infamous figures of Soviet espionage, and suggest that petitioner had been indicted for espionage.

The source of information concerning Wolston upon which Barron purportedly relied was the FBI report "Expose of Soviet Espionage" (CA App. 296; 64). Barron stated by affidavit that: "At no time have I been aware of any fact that would give me reason to doubt the truth of the FBI Report or of any statement in it." (CA App. 295). Nonetheless, he knew that notwithstanding the report's purported identification of Wolston as a Soviet agent who had committed espionage against the United States, Wolston had not been indicted for espionage, or perjury or the making of false statements in connection with the

investigation in which he was compelled to testify (CA App. 57). Barron also admitted to having been "very familiar" with the Boris Morros book, and of the distrust of Soble's veracity which Morros expressed in that book (CA App. 86). Nevertheless, Barron made the statements concerning Wolston despite their seriousness, without utilization of the extensive research facilities available to him, without any inquiry of the federal agencies which had assured him of their willingness to cooperate, and without investigation of any kind (CA App. 33, 42, 45, 50-51, 62, 72), notwithstanding that any inquiry would have established, among other things, that Wolston had not been "dismissed" by the State Department, that Wolston had been employed by the Army Map Service in an obviously sensitive position following his purported identification as a Soviet agent, and that the description of Slava as a U.S. Army Colonel did not mesh with Wolston's actual position as a low rank civilian employee.

On this record, the courts below first concluded that Wolston was a "public figure" and then, according total acceptance to Barron's self-serving statement that he harbored no doubts as to the accuracy of the FBI report (App. A-12), determined that summary judgment should be granted thereby depriving Wolston of an opportunity to have a jury assess Barron's credibility and perhaps reach inferences with respect to the publication of these defamatory statements about petitioner different than the inferences drawn by the judges who considered the matter.

REASONS FOR GRANTING THE WRIT

I.

A. The Determination of the Courts Below That Petitioner is a Public Figure is Contrary to the Decisions of This Court

In Time, Inc. v. Firestone, 424 U.S. 448, the Court said:

> "[W]hile participants in some litigation may be legitimate 'public figures' either generally or for the limited purpose of that litigation, the majority will resemble the respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the state or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by being drawn into a courtroom." (Id. at 457) (emphasis supplied).

This Court therefore concluded that notwithstanding Mrs. Firestone's involvement in a notorious divorce action, her adulterous conduct which had made the divorce proceeding a matter of substantial press and public interest, and her own resort to the media through the convening of a press conference, she was not a "public figure" and was entitled to the same opportunity to prove her case for libel as any other person. Thus, the Court further marked its departure from the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, a departure which had commenced with the opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323, which had emphasized the legal significance of voluntary actions by "public figures" in "thrust[ing] themselves to the forefront of particular controversies in order

to influence the resolution of the issues involved" to the exclusion of the contextual consideration that the controversial matter was of interest to the public. (Id. at 345).

Given the teaching of Firestone, we would have thought it plain that Wolston's involvement in a criminal proceeding could not work a metamorphosis transforming him from a private person into a public figure. Nonetheless, the courts below held that he was a public figure, purporting to find the requisite voluntariness in Wolston's failure to comply with one grand jury subpoena which in turn led to his involvement in a criminal contempt proceeding. However, if any conduct which produces the need "to defend [oneself] against actions brought by the state" is perforce sufficient to make one a public figure, the distinction between public and private figures delineated by Gertz and Firestone would be rendered meaningless in any context involving criminal proceedings.

To be sure, there could be circumstances under which the conduct which leads to a criminal proceeding is the functional equivalent of mounting a public rostrum. This would be true in almost every instance of arrest for public protest on a political or social issue, but there is not the slightest indication that that was the case here. The record shows with unusual clarity that in failing to comply with one of a series of jury subpoenas, Wolston was trying to crawl into a hole, not to mount a rostrum. In concluding that Wolston was nonetheless a public figure, the courts below decided this federal constitutional question in a way in conflict with the recent decisions of this court.

B. Alternatively, if Firestone Does Not Clearly Stand for the Proposition That Persons Like Wolston Are Not Public Figures, There is a Question of Substantial Importance Which the Court Has Not, But Should Decide

Petitioner believes that the teaching of Firestone is clear and controlling in his favor. If it is not, then the question presented is one which is both important and recurrent and should be settled by this Court for the benefit of federal and state inferior courts as well as the media.

Commentators have expressed the view that Firestone has failed to provide a clear definition of standards.

> "[M]edia will have serious difficulty in determining who is a public figure within the purview of the New York Times standard. * * * How restrictive the definition may be will require a further pronouncement from the Court." 1 A.B. Hanson, Libel and Related Torts, ¶ 141 (Supp. 1976).

See also: Comment, Defamation Law After Time, Inc. v. Firestone, 13 Idaho L. Rev. 53 (1976); Case Note, Constitutional Law - Defamation - the New York Times Standard and Reports of Judicial Proceedings: Time, Inc. v. Firestone, 424 U.S. 448 (1976), 37 Ohio S.L.J. 881, 890 (1976). If Firestone, which arose out of a civil divorce proceeding, presents general difficulties in determining who is a public figure, a case arising from the context of a criminal proceeding must present exceptional difficulty.

The state of confusion among the lower courts in applying Firestone to such a context is demonstrated in the opinion of the United States Court of Appeals for the Fourth Circuit in Anderson v. Stanco Sports Library, 542 F.2d 638, which, taking

cognizance of Firestone, stated that it was "not clear whether * * * plaintiff [a convicted murderer] falls within [the public figure or private person] categories." (Id. at 640). The court considered that Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, "may be seen as supporting the conclusion that Anderson is such a public figure" but saw tension between such a conclusion and the language of this Court's Firestone opinion quoted at p. 10 of this petition. (Id. at 640 n.5). The Fourth Circuit was able to leave its quandary unresolved by proceeding to decide Anderson on other grounds, but such an opportunity will not necessarily occur in other cases.

If, as Firestone commands, one disregards the high public interest context of petitioner's action in failing to comply with one of a series of harassing subpoenas, the decision of the court below can be seen clearly as a holding that any action whatever that results in a person being subject to criminal process, be it failure to comply with a subpoena or the commission of an aggravated felony, makes that person a public figure and strips him of that degree of protection which the law of defamation would otherwise afford. Here, Wolston, for having failed to comply with a subpoena, was falsely identified as a Soviet agent without having redress. His punishment for failure to obey a subpoena was meted out by a federal judge. That punishment should not be extended by making him fair game for one who would carelessly name him as an infamous spy.

Reports concerning those who are involved in criminal proceedings are the daily meat of the press as well as the subject of retrospective examination by periodicals and books.

Libel complaints brought by those who have been obliged to defend themselves in criminal proceedings can fairly be characterized as commonplace. Arising as they do in a context in which First Amendment press protection is in conflict with individual rights, the question is one which warrants elucidation by the Court as to whether, and under what circumstances, such persons are and are not public figures.

II.

The Grant of Summary Judgment on the Malice Issue is in Conflict With the Decisions of This Court and of Another Court of Appeals

In determining that the defendants were entitled to summary judgment on the issue of whether there was "malice" in the New York Times sense, the Court of Appeals accepted as true the deposition testimony and affidavit of the defendant Barron (App. A-12). It thereupon asserted: "To meet this evidence of good faith and get to a jury Wolston was required to produce evidence that notwithstanding his asserted reliance upon the book and report Barron 'in fact entertained serious doubts as to the truth of his publication' and recklessly disregarded whether it was true or false. St. Amant v. Thompson, 390 U.S. 727, 731 (1968)." (Id.). The court then made its own choice among the conflicting inferences which were possible from the evidence adduced by plaintiff, and again accepted and relied on the explanations in Barron's affidavit and deposition.

It is plain that the court erred in crediting Barron rather than allowing a jury to pass on his credibility, and

that it compounded that error in resolving the conflicting inferences in favor of the party that had moved for summary judgment rather than against that party. It is only necessary to apply to this case principles which are well established by this Court, but to which the District of Columbia Circuit has made an unwarranted exception in defamation suits which are governed by New York Times -- an exception expressly disapproved by another Court of Appeals.

Under the New York Times malice standard the state of mind of the defendant is central to the issue of liability once it was determined that plaintiff is a public figure. In Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, the Court said:

> "We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" 2/

These principles were reaffirmed at the last Term in Agosto v. Immigration & Naturalization Service, 98 S.Ct. 2081:

2/ 368 U.S. at 473, footnote omitted.

> "* * * just as a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented, see Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, [467-468] (1944); 6 Moore, Federal Practice ¶ 56.02[10], at 56 45 (2d ed. 1976), so too a court of appeals is not at liberty to deny an individual a de novo hearing on his claim of citizenship because of the court's assessment of the credibility of the evidence * * *. Particularly where the evidence consists of the testimony of live witnesses concerning material factual issues, it will seldom if ever be appropriate to deny a de novo hearing, since '[i]t is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.' Poller v. Columbia Broadcasting System, Inc., supra, 368 U.S. at 473."

It is also well established that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion * * *." Adickes v. Kress & Co., 398 U.S. 144, 158-159, quoting United States v. Diebold, Inc., 369 U.S. 654, 655.

Nothing in this Court's decisions justifies a different standard for determining when a summary judgment may be granted when the movant is a defendant who relies on New York Times malice test. The passage from St. Amant v. Thompson which was quoted above reiterates the substantive standard of liability and says nothing about the method of proof. On the contrary, the Court said later in the same opinion:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." 390 U.S. 732.

Nevertheless, the District of Columbia Circuit has established a special rule for determining whether a defendant is entitled to summary judgment on the "malice" issue.

In Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir.), cert. denied, 385 U.S. 1011, which was cited by the court below in introducing its discussion of the malice issue (App. A-9), the court, after describing the important functions of summary judgment, stated: "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate." (Id. at 968). Judge Wright, the author of that opinion, reaffirmed those views in Wasserman v. Time, Inc., 424 F.2d 920, cert. denied, 398 U.S. 940. On behalf of himself and Circuit Judge Robinson, he wrote (id. at 922):

> "In my judgment New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the Times test of actual knowledge or reckless disregard of the truth. Cf. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964). Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant. Washington Post Co. v. Keogh, 125 U.S.App.D.C. 32, 365 F.2d 965, 20 A.L.R. 3d 972 (1966), cert denied, 385 U.S. 1011, 87 S.Ct. 708, 17 L.Ed.2d 548 (1967). Compare Goldwater v. Ginzburg, 2 Cir., 414 F.2d 324, 336-337 (1969), cert. denied, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970)."

But the Court of Appeals for the Ninth Circuit has expressly disagreed with the District of Columbia Circuit. In Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F.2d 438, cert. denied, 419 U.S. 872, the court said:

"However, with respect, we are not persuaded by the second phase of Judge Wright's analysis in Wasserman which suggests that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.

The standard against which the evidence must be examined is that of New York Times and its progeny. But the manner in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the New York Times standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case." (Id. at 441, emphasis in original).

It is plain that the Court of Appeals for the District of Columbia Circuit, faithfully following its own practice, did in this case precisely that which the Ninth Circuit held should not be done. There is, therefore, a clear conflict in the Circuits on the question whether, as the Ninth Circuit put it, New York Times speaks to "the manner in which the evidence is to be examined" as well as the "standard" of liability. (Id.). That is a question which can potentially arise in every defamation suit involving a public figure or official. The rule in the District of Columbia Circuit represents an additional

obstacle to recovery by such plaintiffs, and as such alters the balance which this Court struck between the interests of individuals in their own reputation and that of the press to comment on public affairs and public figures. The case is thus a variant of the problem presented by Herbert v. Lando, No. 77-1105, cert. granted, March 20, 1978. [3/] Moreover, the decision below is plainly inconsistent with the principles established by this court's decisions in interpreting F.R.Civ.P. Rule 56. Accordingly, certiorari should be granted on this issue as well. Indeed, the Court of Appeals' error is so patent that if the "public figure" issue does not independently merit review, summary reversal of the summary judgment may be appropriate here, as it was in Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

3/ This parallel is recognized by counsel for respondents in Herbert who rely on the D.C. Circuit summary judgment rule, but without mentioning the Ninth Circuit's contrary view. See Brief for Respondents, No. 78-1105, pp. 58-59. See also brief for New York Times, et al. as amici curiae, pp. 20, 24-25. While we express no views concerning the outcome in Herbert, it is clear that the argument for a special rule favoring the defendant which is made there against the ordinary rules of discovery -- that they would conflict with the First Amendment inhibiting press from obtaining information -- has no counterpart here. The only argument for not applying the ordinary rules is that the defendant should be protected from the expense of litigation, a factor which, as we read New York Times v. Sullivan, the Court has already considered in defining the privilege and in rejecting the absolute immunity proposed by the concurring Justices.